



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Montana State Office
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P.O. Box 36800

Billings, Montana 59107-6800

IN REPLY TO:

SDR-922-00-01
NDM-85992
3165.3 (922.JA) P

MAR 06 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DECISION

Upton Resources Inc.
#3200, 500-4th Avenue S.W.
Calgary, Alberta T2P 2V6

SDR No. 922-00-01

AFFIRMED

Upton Resources USA Inc. (Upton) requests a State Director Review (SDR) of a Decision (Enclosure 1) to deny its request for a lease stipulation waiver, exception or modification (WEM), issued by the North Dakota Field Office (NDFO) on January 24, 2000. The SDR request was considered timely filed on February 18, 2000, in accordance with 43 CFR 3165.3(b), and assigned number SDR-922-00-01.

Upton filed a notice of staking on September 2, 1999, to start the permitting process for the Shade No. 18-2 oil well on Federal oil and gas lease, NDM-85992. The NDFO notified Upton on October 7, 1999, about two no surface occupancy (NSO) lease stipulations that overlapped the Shade No. 18-2 well site (Enclosure 2). This notification also included information about the lease stipulations, the opportunity for lease stipulation WEMs and the possibility that the well proposal could be rejected if Upton did not justify its WEM request with sufficient documentation. Upton moved its proposed well site to avoid one of the NSO stipulations and submitted its WEM request for the bighorn sheep NSO stipulation on January 6, 2000 (Enclosure 3).

The implementing regulations for oil and gas lease stipulation modifications (exceptions and modifications) and waivers are found at 43 CFR 3104.1-4. These regulations state that a stipulation shall be modified or waived, only if the authorized officer determines that the factors leading to including a stipulation in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if proposed operations would not cause unacceptable impacts.

The NDFO has determined that the bighorn sheep NSO stipulation is still necessary because the section of land containing the Shade No. 18-2 well site has been documented as high use bighorn sheep habitat and the North Dakota Game and Fish Department plans to transplant bighorn sheep into the area at

some time in the future. The NDFO also decided that Upton's WEM request did not provide sufficient mitigation to modify the NSO stipulation.

Upton's statements from the SDR are enumerated below, followed by our response to the issues raised.

1) Upton purchased these leases in anticipation of the "Bighorn Sheep Ecology and Demography in the North Dakota Badlands" study's completion in 1996, and that the NSOs would be removed or modified based upon the conclusions of the research.

2) The NSO purpose has been served. The Moody Plateau herd was to be the baseline group around which all oil and gas development would be suspended so that the effects could be gauged on other herds where activity continued. At this time, we understand that there are no bighorn sheep in the Moody Plateau area and the study is not active. If the sheep are gone, there is no more data to gather; if the study has stopped gathering data, then there is no need to curtail activity for a baseline herd. In either case, we believe that the NSOs should expire.

Upton purchased the subject lease believing the NSO stipulation would be removed or modified based upon the conclusions of research, including the "Bighorn Sheep Ecology and Demography in the North Dakota Badlands" (study). Upton also believes the purpose of the NSO stipulation has expired because bighorn sheep no longer inhabit the Moody Plateau area and the study is complete.

The purpose of the bighorn sheep NSO stipulation is described in the stipulation language (Enclosure 4) and the Southern Little Missouri and Cedar River National Grasslands Oil and Gas Leasing Final Environmental Impact Statement, Records of Decision (RODs), dated August 1995 and April 1996. An NSO stipulation is included to prohibit oil and gas activities within bighorn sheep habitat. This stipulation also includes language about considering leasing conditions when the study is released. The stipulation says the area will be re-evaluated for leasing conditions when the study is released in August 1996. Provisions for granting WEMS are also included in Appendix D of the Southern Little Missouri and Cedar River National Grasslands Oil and Gas Leasing Final Environmental Impact Statement, May 1995 (Enclosure 5). Appendix D was modified slightly when the second ROD was issued for this EIS, although no substantial changes were made (Enclosure 6). The WEM provisions caution that approving a WEM is unlikely until after the study results are adequately analyzed. After such an analyses is done, WEMs may be granted based on the results of the analysis of the study.

Bighorn sheep habitat is defined in the Southern Little Missouri and Cedar River National Grasslands Oil and Gas Leasing Final Environmental Impact Statement, May 1995 (Enclosure 7). The habitat identified for the analysis and ultimately affected by the leasing decision is supported by observations, radio locations, and tracks detected by researchers from 1986 through 1993.

Language from the 1995 ROD (Enclosure 8) helps clarify the purpose of the stipulation and what would happen after the study is released. It states:

"...the issue related to the Sheep study has been expanded since the start of this environmental analysis. Initially, this issue was to address the concern of preserving the integrity of the sheep study. Since then, it has been redefined to include our ability to consider recommendations coming out of the study, analyze and make a decision as to what protection requirements would be appropriate, and then be able to implement them. As mentioned above under bighorn sheep, all new leases in bighorn sheep habitat will be issued with an NSO stipulation with WEMs unlikely until the results of the study have been adequately analyzed. Leasing sheep habitat in this manner provides the flexibility described above, so no further decision is needed to address this issue. Please refer to the discussion on bighorn sheep above for the details of the decision."

The last sentence from this section of the ROD is referring to the description of how the leasing decisions apply to bighorn sheep habitat. It is also included in Enclosure 8. In addition, the ROD states:

"...if it is determined that lesser stipulations are needed in certain areas, to adequately protect the bighorn sheep, then these results may be incorporated into an analysis that considers a waiver, exception, or modification for already leased land at the Application for Permit to Drill stage, or a revised leasing decision for lands not yet leased."

The study was completed during December 1997, and released to the BLM on February 4, 1998 (Enclosure 9). Since this time a set of bighorn sheep management recommendations, which include consideration of the study results, has been circulated by the North Dakota Game and Fish Department and U.S. Forest Service (Enclosure 10). These management recommendations include guidelines for new leasing decisions in bighorn sheep habitat, but they do not include any standards or guidelines for evaluating existing lease stipulation WEM requests.

It is Upton's belief that the NSO stipulation for bighorn sheep is not settled until the study is complete. This finding is correct. However, the record shows that the purpose of the NSO stipulation is to preserve the area until the study is complete, so the results of the study could be used to ultimately provide appropriate protection requirements for bighorn sheep habitat, which could include continuation of the NSO stipulation. The record also shows that the Moody Plateau bighorn sheep herd no longer inhabits the area as asserted by Upton. However, the intent of the stipulation is to protect bighorn sheep habitat and there is no dispute about whether or not the section of land which contains Upton's well site is bighorn sheep habitat. Finally, the NDFO did consider information from the study, as required by the lease stipulation and decisions implementing the bighorn sheep NSO stipulation, when evaluating Upton's WEM request. The arguments raised by Upton do not demonstrate that the reasons for including the bighorn sheep NSO stipulation in their lease have changed sufficiently, and the record still supports use of this stipulation.

3) We have been verbally informed that there are plans by Game and Fish to reintroduce the sheep to this area. We believe introducing sheep to this area

is beyond the scope of the original NSO and, hence, the NSO cannot be maintained for this reason.

We agree with Upton's finding that the North Dakota Game and Fish Department has plans to reintroduce bighorn sheep into the Moody Plateau area. Upton believes that the NSO stipulation should not be maintained for the protection of transplanted bighorn sheep. Our findings, in response to contentions 1 and 2 show that part of the NSO stipulation purpose is to appropriately protect bighorn sheep habitat. The NDFO decision shows that the area where Upton proposes to drill is documented high use habitat for bighorn sheep. Even though bighorn sheep no longer inhabit the Moody Plateau area, the habitat is suitable for bighorn sheep and the NSO stipulation would still apply according to the language and purpose of the stipulation.

4) From the information Upton has reviewed, it would seem that the biggest threats to a bighorn sheep herd are predation by coyotes, hunting, genetic viability (i.e., herd size), winter cold, and adequate nutrition.

The reasons why the NDFO reached its decision are the demonstrated use of the habitat in the area Upton proposes to drill, and the need to continue protecting this habitat with an NSO stipulation. Although the threats to bighorn sheep are important for species management, they are not related to the NDFO's decision concerning the appropriate mitigation to protect habitat.

5) The presence of wells benefit the sheep. The study has stated that, in areas where development continued, the preferred lambing site for the sheep was near wells and that the sheep could habituate to human presence. It is possible that the lack of wells contributed to the lamb mortality in the NSO area (Moody Plateau) of 100 percent, while the lamb mortality rate in the other non-NSO area (Magpie Creek) was about 65 percent.

Upton's finding that wells benefit bighorn sheep is supported by selected portions and statements from the study and a 1992 study Quarterly Progress Report for July 1 through September 30, 1992.

The completed study finds that recruitment (lamb survival after August 31) is essential to the long-term survival of the herds because lambs recruited to the population are capable of maintaining and propagating the herd. Lamb recruitment was used to assess reproductive characteristics rather than lamb mortality, because recruitment is generally easier and more accurately measured than total lamb production and it provides more meaningful information. The two primary study areas (Moody Plateau and Magpie Creek) were combined with seven supplemental groups and divided into three levels of human impact; low, moderate, and high. The study finds that there was no significant difference in lamb recruitment between the Moody Plateau and Magpie Creek areas. It also concludes that recruitment of lambs was significantly higher in areas with low levels of human disturbance than it was with areas with moderate (Moody Plateau) or high (Magpie Creek) levels of human disturbance (Enclosure 11).

The study states that, "...although bighorns may eventually acclimate to various disturbances, it appears a reproductive decline may be noted until the acclimation occurs." Upton's conclusion about sheep habituating to human presence does not provide sufficient evidence, in light of a complete review

of the study and its findings about reproductive characteristics, to conclude that the proposed operations would not cause unacceptable impacts to bighorn sheep habitat.

6) Upton has already agreed to minimize the impact on any bighorn sheep in the area should they once again occupy the area. The following guidelines will be enforced:

- 1) The well location will be enclosed with sheep type fence and not be reseeded unless it is required.
- 2) Equip the motor with a quieting muffler pointed eastward away from Moody Plateau.
- 3) Limit operator activity between 10 a.m. to 4 p.m.
- 4) No firearms or dogs will be allowed on the location.
- 5) Restrict access to the landowner and necessary personnel with a fence and locked gate at the beginning of the access road.
6. Restrict drilling activities to outside of lambing season.

This package of mitigation measures only includes six of the eight guidelines proposed by Upton in their January 6, 2000, request for a WEM. The NDFO decision concludes that Upton's mitigation measures are excellent, but not sufficient enough for it to determine that the proposed action would not cause unacceptable impacts. Upton does not specifically dispute the NDFO's decision concerning the adequacy of proposed mitigation measures and the subject SDR request does not provide any information to demonstrate that proposed operations, including six mitigation guidelines, would mitigate impacts to an acceptable level.

One of the purposes of the NSO stipulation to protect bighorn sheep habitat is still valid. The NDFO used the results of the study to make their decision, and Upton has not demonstrated that their proposed operation would result in an acceptable level of impacts. Therefore, we affirm the January 24, 2000, decision of the NDFO.

There are ongoing efforts to review the bighorn sheep studies and share analysis of study results, that have been completed to date, with the original parties involved in funding research on bighorn sheep in the North Dakota badlands. A meeting is scheduled on April 5, 2000, in Bismarck, North Dakota, at the North Dakota Game and Fish Department headquarters located at 100 North Bismarck Expressway (Enclosure 12).

We believe you would receive the best information concerning the North Dakota Game and Fish Department's plans to reintroduce bighorn sheep into the Moody Plateau area by contacting Mr. Randy Kreil with the North Dakota Game and Fish Department. Mr. Kreil can be reached at (701) 328-6330 and should also be contacted if you are interested in attending the April 5, 2000, meeting.

This Decision may be appealed to the Board of Land Appeals Office of the Secretary, in accordance with the regulations contained in 43 CFR 4.400 and

Form 1842-1 (Enclosure 13). If an appeal is taken, a Notice of Appeal must be filed in this office at the aforementioned address within 30 days from receipt of this decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. The appellant has the burden of showing that the Decision appealed from, is in error.

If you wish to file a Petition for a Stay of this Decision, pursuant to 43 CFR 3165.4(c), the Petition must accompany your Notice of Appeal. A Petition for a Stay is required to show sufficient justification based on the standards listed below. Copies of the Notice of Appeal and Petition for a Stay must also be submitted to each party named in this Decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

IS/ John E. Moorhouse

Thomas P. Lonnie
Deputy State Director
Division of Resources

13 Enclosures

- 1-January 24, 2000, NDFO Decision (2 pp)
- 2-October 7, 1999, NDFO Letter (11 pp in its entirety)
- 3-January 6, 2000, Upton WEM Request (3 pp)
- 4-NDM-85992 Bighorn Sheep No Surface Occupancy Stipulation (1 pp)
- 5-Appendix D - Bighorn Sheep No Surface Occupancy Stipulation (1 pp)
- 6-Modified Appendix D-Bighorn Sheep No Surface Occupancy Stipulation (1 pp)
- 7-May 1995, EEIS Affected Environment Description of Bighorn Sheep Habitat (1 pp)
- 8-August 1995, ROD Bighorn Sheep Habitat and Study Decisions and Rationale (3 pp)
- 9-February 4, 1998, Letter from North Dakota Game and Fish Department (1 pp)
- 10-March 22, 1999, Recommendations Regarding Management of Bighorn Sheep on USFS Lands in North Dakota (8 pp)
- 11-December 1997 Bighorn Sheep Study (41 pp)
- 12-February 18, 2000, Letter Announcing April 5, 2000, Meeting (2 pp)
- 13-Form 1842-1 (1 p)